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**Does a Right to a
Physical Hearing Exist
in International
Arbitration?**

CANADA

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a. Parties' Right to a Physical Hearing in the *Lex Arbitri*

1. *Does the lex arbitri of your jurisdiction expressly provide for a right to a physical hearing in arbitration? If so, what are its requirements (e.g., can witness testimony be given remotely, etc.)?*

Short answer: No. The laws governing international arbitration in Canada do not expressly provide parties with a right to a physical hearing.

Canadian arbitration laws are mostly matters of provincial jurisdiction. Each province has enacted legislation pertaining to both international and domestic arbitrations.¹ While a federal arbitration statute does exist, it applies only in limited circumstances where at least one of the parties to the arbitration is the federal government, a federal departmental corporation, or a Crown corporation.²

Each province's legislation governing international arbitration adopts and incorporates the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"), with minor modifications.³ In line with the Model Law, Canadian provinces do not expressly provide parties with a right to a physical hearing and have no specific prohibition against holding an oral hearing through telephone calls or videoconferencing.

Under the Model Law, a party may seek to set aside an arbitral award, or have a court refuse its enforcement, on the basis that the party was "unable to present his case" or that "the arbitral procedure was not in accordance with the agreement of the parties".⁴

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¹ In Canada's common law provinces, there are separate statutes for domestic and international arbitration matters. For example, the province of Ontario has enacted the Arbitration Act, 1991, S.O 1991, c 17 for domestic arbitration matters and the International Commercial Arbitration Act, R.S.O 1999 c. I.9 for international commercial arbitration matters. The province of Quebec does not have a separate international arbitration statute. Instead, all arbitrations that take place in the province are subject to the provisions of Civil Code of Procedure, R.S.Q., c C-25 (as am.), Arts. 940-952; and Québec Civil Code, S.Q. 1991, c 64, Arts. 2638- 2643, 3121, 3133, 3148, 3168.

² Commercial Arbitration Act, RSC 1985, c 17 (2nd Supp).

³ UNCITRAL, Model Law on International Commercial Arbitration, available at <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> (last accessed 2 February 2021).

⁴ Model Law, Arts. 34(2)(a)(ii), (iv) and 36(1)(a)(ii), (iv).

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While Canadian courts have not yet considered whether these provisions require a physical hearing, recent jurisprudence in the context of court proceedings makes it unlikely that a court will hold that a party to an arbitration was unable to present its case in the context of a virtual proceeding, provided that all participants can be heard.

For example, in *Arconti v. Smith*,⁵ the Ontario Superior Court of Justice ordered that an examination of a witness proceed by way of videoconference, or not at all. The plaintiffs in that case argued that the lack of physical presence would deprive them of the occasion of solemnity and a morally persuasive environment. The Court, while recognizing legitimate concerns about the use of technology, responded by stating: “It’s 2020... We now have the technological ability to communicate remotely effectively. Using it is more efficient and far less costly than personal attendance. We should not be going back”.⁶

Since *Arconti v. Smith*, courts in other provinces have determined that video conferencing can serve as a substitute for in-person hearings. In Alberta, a lower court rejected the defendant’s claim that a denial of an in-person hearing is unconstitutional, indicating that courts have jurisdiction to direct questioning to occur via videoconference.⁷ In Ontario, courts have been directed that “all (non-jury) matters should proceed virtually unless it is absolutely necessary to hold the proceeding in person”.⁸

Other courts have also recognized that, “virtual hearings are likely to retain a permanent place in the judicial tool box”.⁹ Meanwhile, the rules used by major Canadian arbitral institutions provide broad discretionary powers to tribunals to determine the appropriate method for conducting a hearing, including the ability to utilize virtual hearings.

In light of these decisions, and the lack of an express right to a physical hearing under the Model Law, Canadian courts are unlikely to conclude that a right to a physical hearing exists.

2. *If not, can a right to a physical hearing in arbitration be inferred or excluded by way of interpretation of other procedural rules of your jurisdiction’s lex arbitri (e.g., a rule providing for the arbitration hearings to be “oral”; a rule*

⁵ *Arconti v. Smith*, 2020 ONSC 2782.

⁶ *Ibid.* at para. 19.

⁷ *Mostafa Altalibi Professional Corporation v Lorne S. Kamelchuk Professional Corporation*, 2020 ABQB 673, available at <<https://www.canlii.org/en/ab/abqb/doc/2020/2020abqb673/2020abqb673.html>> (last accessed 2 February 2021).

⁸ *R. v. Patriquin*, 2021 ONSC 359 at para. 5 (applying the Notice to the Profession and Public respecting court proceedings dated December 22, 2020, issued by the Chief Justice).

⁹ *Scaffidi-Argentina v Tega Homes Developments Inc.*, 2020 ONSC 3232 at para. 1.

allowing the tribunal to decide the case solely on the documents submitted by the parties)?

Short answer: Likely not.

Under Canada’s international commercial arbitration statutes, there are certain circumstances under which an oral hearing is required. For example, the Model Law requires arbitral tribunals to hold oral hearings where requested by a party.¹⁰

Nothing in the language of these statutes, however, implies that hearings must take place in person. Additionally, there are no Canadian cases requiring an arbitral tribunal to offer a physical hearing. Nor does the case law in the context of court litigation support a requirement for witnesses to be physically present.

Where the legislation requires an oral hearing, this requirement can generally be satisfied without the need to provide a physical hearing. The purpose of an oral hearing is to allow the parties to present their case and the governing concern is fairness of procedure. Fairness requires that each party receive adequate notice as well as an opportunity to not only present evidence but also challenge evidence given by the other parties’ witnesses and respond to oral submissions.¹¹ While a hearing must be in the presence of each party and each member of the arbitral tribunal who participates in the decision, physical presence is not a requirement.

b. Parties’ Right to a Physical Hearing in Litigation and its Potential Application to Arbitration

3. *In case the lex arbitri does not offer a conclusive answer to the question whether a right to a physical hearing in arbitration exists or can be excluded, does your jurisdiction, either expressly or by inference, provide for a right to a physical hearing in the general rules of civil procedure?*

Short answer: No. The Rules of Civil Procedure (the “Rules”) in each province and territory do not expressly confer on parties the right to a physical hearing.

While most provinces do afford parties the right to an oral hearing, this right is subject to civil procedure legislation, which waives the oral hearing requirement under certain circumstances. For example, some provinces limit the right to an oral hearing for

¹⁰ Model Law, Art. 24.

¹¹ *Corporacion Transnacional de Inversiones S.A. de C.V. v. STET International S.p.A.*, (1999) 45 O.R. (3d) 183 (aff’d by Ontario Court of Appeal, [2000] O.J. No. 3408) at paras. 31, 33, 43; *Petersoo v. Petersoo*, 2019 ONCA 624; *Syndicat des employés professionnels de l’Université du Québec à Trois-Rivières c. Université du Québec à Trois-Rivières*, 1993 CanLII 162 (SCC).

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certain interlocutory matters. Furthermore, many Canadian jurisdictions expressly permit certain routine types of motions to be heard in writing, as opposed to orally.¹²

With minor variations, the Rules across Canada provide for hearings to be conducted by way of telephone or video conference in appropriate circumstances. Likewise, Canada's Federal Court Rules permit the court to order hearings by way of audio or video conferencing, or by other electronic means.¹³

4. *If yes, does such right extend to arbitration? To what extent (e.g., does it also bar witness testimony from being given remotely)?*

Short answer: No.

As noted above, there is no express right under Canadian civil procedure rules to a physical hearing. Even if the Rules afforded parties such a right, arbitrators are not required to follow civil procedure rules.

Canadian arbitration laws generally allow the parties to agree on their own procedural rules for conducting arbitrations, including those that differ from provincial court rules.

A salient feature of the Model Law contained in Article 18, for arbitrations seated in Canada, provides that parties are to be treated with equality and given a full opportunity to present their respective cases. The Ontario Superior Court of Justice has noted that the requirements of equality, fairness and "procedural fairness" are "so important that [arbitration legislation] has given them a special status, and confirmed that parties cannot contract out of them".¹⁴ Thus, where parties choose their own procedure, such a framework must be fair and effective for both parties.

c. Mandatory v. Default Rule and Inherent Powers of the Arbitral Tribunal

5. *To the extent that a right to a physical hearing in arbitration does exist in your jurisdiction, could the parties waive such right (including by adopting institutional rules that allow remote hearings) and can they do so in advance of the dispute?*

Short answer: N/A

6. *To the extent that a right to a physical hearing in arbitration is not mandatory or does not exist in your jurisdiction, could the arbitral tribunal decide to hold a*

¹² This is the case, for example, in Ontario as prescribed under the Consolidated Provincial Practice Direction dated April 11, 2014, at paras. 47-51.

¹³ Federal Courts Rules (SOR/98-106) s.32.

¹⁴ *Jirova v Benincasa*, 2018 ONSC 534 at para. 18.

remote hearing even if the parties had agreed to a physical hearing? What would be the legal consequences of such an order?

Short answer: Likely not.

The Supreme Court of Canada has recognized a clear legislative approach and judicial policy favouring autonomy of the parties in the arbitration context.¹⁵ Furthermore, under the Model Law, an award may be set aside if “the arbitral procedure was not in accordance with the agreement of the parties”. Therefore, an arbitral tribunal should rarely interfere with the autonomy of the parties to choose their dispute resolution process.

While Canadian laws governing international arbitration typically afford broad powers to tribunals to determine procedures as they consider appropriate, these powers are limited where the parties agree to their own procedure. Canadian arbitration statutes are grounded in the principle that parties should be free to design the arbitral process in an international commercial arbitration as they see fit as long as the process is fair to both parties.¹⁶ Thus, where the arbitration agreement requires the parties to hold a physical hearing, or they otherwise agree to such procedure after the arbitral tribunal has been appointed, arbitrators should comply with the specified provisions or agreement. This would not necessarily exclude an arbitrator from declining an appointment, or resigning from an appointment, if the arbitrator is unwilling to be physically present.

The arbitral tribunal retains the discretion to hold a remote hearing to the extent that the parties’ agreement to the physical hearing is not expressly stated or is ambiguous. In these circumstances, the tribunal may consider encouraging parties to adopt a remote hearing and, if necessary, exercise its discretion to issue a procedural order to that effect. On any subsequent challenge to the award, the tribunal’s decision on whether or not to hold a physical hearing would be owed deference and the award would be unlikely to be set aside unless it led to a breach of natural justice.

d. Setting Aside Proceedings

7. *If a party fails to raise a breach of the abovementioned right to a physical hearing during the arbitral proceeding, does that failure prevent that party from using it as a ground for challenging the award in your jurisdiction?*

Short answer: Yes.

¹⁵ *TELUS Communications Inc. v. Wellman*, 2019 SCC 19 at para. 52; *Desputeaux c Éditions Chouette (1987) inc.*, 2003 SCC 17 at para. 22, available at <[https://nextcanada.westlaw.com/Document/I10b717d4688363f0e0440003ba0d6c6d/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)>](https://nextcanada.westlaw.com/Document/I10b717d4688363f0e0440003ba0d6c6d/View/FullText.html?transitionType=Default&contextData=(sc.Default)>) (last accessed 2 February 2021).

¹⁶ Model Law, Art. 19(1).

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A party who has knowledge of non-compliance with the Canadian arbitration provisions or provisions in the arbitration agreement, but continues to participate in the arbitration without stating its objections promptly, is deemed to have waived its right to object to such non-compliance.¹⁷ This waiver under Article 4 of the Model Law applies to non-mandatory provisions of the Model Law, i.e., those provisions in respect of which the parties may otherwise agree.

Beyond waiver under the Model Law, some courts have applied the common law principle of waiver when considering whether the party had adequately preserved its right to object to the recognition and enforceability of the arbitral award.¹⁸ Courts have repeatedly held that a party who fails to object at an appropriate time runs the risk of being foreclosed from later objection. Parties will not be permitted to lie back or act in an indecisive manner, so as to obtain the benefit of a favourable award and then endeavour to set it aside if it is not.¹⁹ However, a recent British Columbia lower court decision held that the province's international commercial arbitration act²⁰ displaced the common law approach to waiver in the context of private rights.²¹

Accordingly, parties in Canada are advised to state their objections without undue delay. This makes it essential for parties to raise their objections as soon as reasonably possible.

8. *To the extent that your jurisdiction recognizes a right to a physical hearing, does a breach thereof constitute per se a ground for setting aside (e.g., does it constitute per se a violation of public policy or of the due process principle) or must the party prove that such breach has translated into a material violation of the public policy/due process principle, or has otherwise caused actual prejudice?*

Short answer: N/A

9. *In case a right to a physical hearing in arbitration is not provided for in your jurisdiction, could the failure to conduct a physical hearing by the arbitral tribunal nevertheless constitute a basis for setting aside the award?*

Short answer: Likely not, although it could in exceptional circumstances.

In Canada, there is generally no right of appeal from an international commercial arbitral award. However, under Article 34 of the Model Law, a party may apply to the court to

¹⁷ Model Law, Art. 4.

¹⁸ *Telesat Canada v. Juch-Tech Inc.*, 2012 ONSC 2785.

¹⁹ *Mullins v. Mullins*, 1983 CarswellOnt 912 at paras. 37-38.

²⁰ *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233.

²¹ *McHenry Software Inc. v. ARAS 360 Incorporated*, 2018 BCSC 586 at para. 53.

set aside an award on the basis of enumerated grounds including contractual capacity, jurisdiction, natural justice, composition and public policy. Canadian courts have confirmed that none of the limited and narrow grounds for setting aside an arbitral decision enumerated in Article 34(2) permit a court to review the merits of an arbitral tribunal’s award even if the tribunal has manifestly erred in fact or in law.²²

When considering public policy reasons for setting aside an arbitral award, the party seeking to set aside the award bears the onus of demonstrating the egregious circumstances that offend Canada’s basic notions of morality and justice. Canadian courts have held that judicial interventions for alleged violations of public policy will be warranted only when conduct cannot be condoned under the law of the enforcing state.²³ For alleged breaches of due process, no single factor is decisive or necessary for an award to be set aside. Some examples that may justify setting aside an award include when a party was not given an opportunity to respond to arguments made by an opposing party or the tribunal ignored or failed to take the evidence or submissions of the parties into account.²⁴

Even if a Canadian court finds a breach of Article 34, it remains within the court’s discretion not to set aside the award. The exercise of this discretion is guided by the principle of party autonomy and strong policy preference of recognizing international commercial arbitral awards. Canadian courts will consider the nature of the breach in the context of the arbitral process and the extent to which such breach undermines the fairness or the appearance of fairness of the arbitration, and the effect of the breach on the award itself.²⁵ In *Popack v Lipszyc*,²⁶ the Court of Appeal for Ontario held that there is no “bright line rule” governing the exercise of judicial discretion on set aside applications.²⁷ In *Popack*, the applicant sought to set aside an arbitral award that was granted in violation of the parties’ procedural rights to attend all scheduled hearings as stipulated under the arbitration agreement.²⁸ Although the applicant demonstrated a procedural error in the arbitration process, the Ontario courts nonetheless refused to set aside the award. In doing so, the courts endorsed an approach that looks to both the extent that the breach undermines the fairness or the appearance of fairness of the arbitration, and the effect of the breach on the award itself.²⁹

²² *Canada (Attorney General) v. Clayton* (2018), 2018 CarswellNat 2065, 18 C.E.L.R. (4th) 230 (F.C.) at paras. 152-154.

²³ *Corporacion Transnacional*, fn. 11 above, at para. 340.

²⁴ *Consolidated Contractors Group S.A.L. v. Ambatovy Minerals S.A.*, 2016 CarswellOnt 18812, 2016 ONSC 7171 at para. 57 (Ont. S.C.J.), affirmed 2017 CarswellOnt 18866, 2017 ONCA 939 (Ont. C.A.), leave to appeal refused 2018 CarswellOnt 17926 (S.C.C.).

²⁵ 2010 QCCA 2269 at para. 61; *Popack v. Lipszyc*, 2016 ONCA 135.

²⁶ *Popack*, fn. 25 above.

²⁷ *Ibid.* at para. 30.

²⁸ *Popack v. Lipszyc*, 2015 ONSC 3460; *Popack v Lipszyc*, 2018 ONCA 635 at para. 45.

²⁹ *Popack*, fn. 25 above, at para. 31.

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A party seeking to set aside an arbitral award on the basis of a lack of a physical hearing would need to demonstrate that the lack thereof materially affected the outcome of the arbitration resulting in “real unfairness” or “real practical injustice”.

e. Recognition/Enforcement

10. *Would a breach of a right to a physical hearing (irrespective of whether the breach is assessed pursuant to the law of your jurisdiction or otherwise) constitute in your jurisdiction a ground for refusing recognition and enforcement of a foreign award under Articles V(1)(b) (right of the party to present its case), V(1)(d) (irregularity in the procedure) and/or V(2)(b) (violation of public policy of the country where enforcement is sought) of the New York Convention?*

Short answer: Likely not.

Canada has adopted and ratified the New York Convention. The implementing legislation for the New York Convention consists of the provincial international arbitration statutes based on the Model Law.³⁰ In the province of Quebec, the Model Law is the basis for the provisions of the Code of Civil Procedure governing both domestic and international arbitration.³¹

It is unlikely that the breach of a right to a physical hearing, if such right is deemed to exist, would lead a Canadian court to exercise its discretion to refuse enforcement.

Canadian courts have a general preference to enforce foreign arbitral awards, unless the limited grounds to refuse enforcement apply. Following from Articles 35 and 36 of the Model Law, arbitral decisions will be binding unless they meet one of the narrow

³⁰ International Commercial Arbitration Act, RSBC 1996, c. 233; Foreign Arbitral Awards Act, RSBC 1996, c. 154; International Commercial Arbitration Act, RSY 2002, c. 123; Foreign Arbitral Awards Act, RSY 2002, c. 93; Enforcement of Foreign Arbitral Awards Act, SS 1996, c. E-9.12; United Nations Foreign Arbitral Awards Convention Act, RSC 1985, c. 16 (2nd Supp); International Commercial Arbitration Act, SS 1988-89, c. I-10.2.; International Commercial Arbitration Act, RSA 2000, c. I-5; International Commercial Arbitration Act, RSNL 1990, c. 1-15; International Commercial Arbitration Act, RSPEI 1988, c. I-5; International Commercial Arbitration Act, RSNS 1989, c. 234; International Commercial Arbitration Act, 2017, S.O. 2017, c. 2, Sched. 5; International Commercial Arbitration Act, RSNB 2011, c. 176; International Commercial Arbitration Act, RSNWT (Nu) 1988, c. 1-6; International Commercial Arbitration Act, SNB 1986, c. I-12.2; International Commercial Arbitration Act, CCSM c. C151.

³¹ Quebec’s laws for the enforcement of foreign judgments are found in Art. 3155 of Title Four of Book Ten of the Civil Code of Québec, and Arts. 785 to 786 of the Code of Civil Procedure.

grounds for exception.³² A reviewing court cannot set aside an international arbitral award simply because it believes the arbitral tribunal wrongly decided a point of fact or law.³³

Article V(1)(b) of the New York Convention enables a court to refuse to recognize an arbitral decision when the party resisting enforcement was not given proper notice or was unable to present its case.³⁴ Lack of physical hearing alone is unlikely to result in a refusal to enforce an arbitral award, because Canadian courts have taken a permissive approach to the discretion and flexibility of arbitral tribunals. Courts typically find that procedural irregularities that do not amount to a violation of procedural public policy as contemplated by Article V(2)(b) is insufficient to deny recognition and enforcement of an award.³⁵ The requirement for proper notice and a fair hearing has been violated in cases where the tribunal decided an issue without first giving the parties the opportunity to address it³⁶ and where parties were deprived of the opportunity to fully participate in the evidentiary process.³⁷

Article V(1)(d) of the New York Convention allows for the refusal of recognition of an arbitral award if the composition of the arbitral tribunal was not in accordance with the parties' agreement, or in the absence of an agreement, the law of the country in which the arbitration took place.³⁸ Procedural irregularities alone will not be sufficient to render a decision invalid. Courts will look further for whether the party seeking dismissal was deprived of, or restricted from, the opportunity to present its arguments and representations to the arbitral tribunal.³⁹

Appellate courts have found that annulment for minor flaws is incompatible with the principles of autonomy that apply to arbitration and clear deference the legislature intended courts to observe with respect to arbitral awards.⁴⁰ If a tribunal's lack of a physical hearing had the effect of eliminating or restricting a party's ability to make submissions, this would likely violate due process in a manner sufficient to warrant

³² *Corporacion Transnacional*, fn. 11 above, at para. 26; *Popack v Lipszyc*, 2018 ONCA 635 at para. 40.

³³ *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 47 B.C.L.R. (2d) 201 (B.C. S.C.), aff'd (1990), [1991] 1 W.W.R. 219 (B.C. C.A.), leave to appeal refused, [1990] S.C.C.A. No. 431 (S.C.C.); *Consolidated Contractors Group SAL (Offshore) v Ambatovy Minerals SA*, 2017 ONCA 939 at para. 23.

³⁴ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S. 3, Art. V(1)(b).

³⁵ *Bayview Irrigation District No. 11 v. United Mexican States*, 2008 CarswellOnt 2682.

³⁶ *Louis Dreyfus & Cie v Holding Tusculum, bv*, 2008 QCCS 5903.

³⁷ *Petro-Canada v. Alberta Gas Ethylene Co.*, 1991 CarswellAlta 522.

³⁸ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, fn. 34 above, Art. V(1)(d).

³⁹ *Holding Tusculum, bv v Louis Dreyfus, sas*, 2008 QCCS 5904 at para. 135.

⁴⁰ *Soci t  d'investissements l'Excellence inc c Rh aume*, 2010 QCCA 2269 at para. 56.

dismissal.⁴¹ However, if submissions were allowed in another functional format (such as online or over the phone), this would likely require more markers of procedural unfairness to warrant a dismissal.

Article V(2)(b) enables a court to refuse to recognize an arbitral decision where the recognition or enforcement of the award would be contrary to the public policy of the recognizing country.⁴² Canadian courts take a deferential approach to the enforcement of international arbitral awards and construe the public policy defence narrowly. As such, an award can be refused enforcement when it offends local principles of justice and fairness in fundamental ways.⁴³ It has been held that judicial intervention may be warranted when the Tribunal's conduct is so serious that it cannot be condoned under the law of the enforcing state, such as when the Tribunal deliberately conceals documents or relied on evidence that it failed to disclose to the parties.⁴⁴

However, in most circumstances, courts do not consider a breach of Canadian law as equivalent to a breach of public policy. In *Boardwalk Regency Corp. v Maalouf*,⁴⁵ the Ontario Court of Appeal enforced a New Jersey judgment based on gambling debts, despite the fact that Ontario's Gaming Act⁴⁶ prohibited the collection of gambling debts. According to the Ontario Court of Appeal, the question of whether the laws were in conflict was not the operative issue. Instead, the arbitral decision must run against essential morality. The Supreme Court of Canada has endorsed this approach, noting that "diversity among the legal systems of the world should be respected".⁴⁷

Given the narrow definition of this ground, a lack of physical hearing on its own is unlikely to offend public policy to the degree necessary to constitute a breach of morality and justice, even if a right to a physical hearing is found to exist in the laws of Canada.

f. COVID-Specific Initiatives

11. *To the extent not otherwise addressed above, how has your jurisdiction addressed the challenges presented to holding physical hearings during the COVID pandemic? Are there any interesting initiatives or innovations in the legal order that stand out?*

⁴¹ *Dreyfus*, fn. 39 above, at para. 76, in which the Quebec Court of Appeal considered whether procedural defects rose to the level necessary to infringe the *audi alteram partem* rule ("let the other side be heard").

⁴² New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, fn. 34 above, Art. V(2)(b).

⁴³ *United Mexican States v. Karpa*, [2005] O.J. No. 16 (Ont. CA) at para. 66, 136 A.C.W.S. (3d) 200, citing *Schreter v. Gasmac Inc.* (1992), 7 O.R. (3d) 608 (Ont. Gen. Div.) at p. 623.

⁴⁴ *Corporacion Transnacional*, fn. 11 above, at para 34.

⁴⁵ *Boardwalk Regency Corp. v. Maalouf*, [1992] OJ No. 26 (Ont. CA).

⁴⁶ Gaming Act, RSO 1980, c. 183.

⁴⁷ *Beals v Saldanha*, 2003 SCC 72 at para. 222.

Short answer: The outbreak of COVID-19 accelerated and improved technology initiatives that were already in place prior to the pandemic.

For many Canadian courts, COVID-19 has expedited technology modernization efforts that already existed.

For example, prior to the pandemic, many parties were not filing their documents electronically with the court even though this option was available to them. Following the outbreak of COVID-19, electronic filings have become increasingly more common. In addition, some Canadian courts, including the Ontario Superior Court of Justice, are now implementing electronic document sharing platforms such as CaseLines.⁴⁸ Once in place, CaseLines will be able to help courts and counsel electronically manage documents before and during hearings.

Like electronic filing, remote hearings are not new. Before COVID-19, audio and videoconferencing were available upon request. The pandemic has drastically increased the number of remote proceedings. Many courts are conducting either fully virtual or hybrid hearings, in which a judge and some parties attend in court while others attend remotely. In order to support an online format, courts have adopted platforms such as Zoom, WebEx and Microsoft Teams, and have issued directives for lawyers and litigants.

Recognizing the need to maintain judicial operations, courts across Canada have ordered remote hearings over the objections of a party. For example, the Federal Court recently directed the parties to resume a trial of a patent infringement action via videoconference despite the defendant's procedural and cybersecurity concerns.⁴⁹

Given the willingness of the Canadian courts to impose virtual hearings as a fair and efficient way to avoid delay, arbitral institutions have also emphasized a commitment to working together to overcome the challenges of working remotely.⁵⁰ While some arbitral institutions already offer flexible and informal virtual processes, Canadian legal practice and processes will likely continue to evolve due to the introduction of virtual hearings.

⁴⁸ Kate GOWER, "Ontario Courts Launch Caselines E-Trial Platform", Gower Modern Law (30 July 2020) at <<https://gowermodernlaw.com/2020/07/ontario-courts-launch-caselines-e-trial-platform>> (last accessed 2 February 2021).

⁴⁹ *Rovi Guides, Inc. v. Videotron Ltd.*, 2020 FC 637.

⁵⁰ "Arbitration and Covid-19" (2020) available at <<https://iccwbo.org/content/uploads/sites/3/2020/04/covid19-joint-statement.pdf>> (last accessed 2 February 2021).